HO SIEW CHOONG & ORS

v.

EVERWORTH SDN BHD

HIGH COURT MALAYA, KUANTAN
APANDI ALI J
[CIVIL APPEAL NO: 28-3-2003]
21 MARCH 2005

COMPANY LAW: *Winding up - Petition - Notice of statutory demand - Validity - Reference to non-existent subsections - Failure to state correct subsections - Whether defective - Companies Act 1965, s. 218 - Whether properly served - Companies Act 1965, s. 218(2)(a) - Companies (Winding-Up) Rules 1972, rr. 24 & 32 - Whether complied with - Failure to comply with basic requirements of provisions necessary to bring petition - Whether fatal to petitioners' case*

COMPANY LAW: *Winding up - Statutory demand - Service of - Sent by AR registered post - Whether sufficient for purpose of s. 218(2)(a) Companies Act 1965 - Whether properly served - Failure to comply with basic requirements of provisions necessary to bring petition - Whether fatal to petitioners' case - Companies Act 1965, s. 218 - Companies (Winding-Up) Rules 1972, rr. 24 & 32*

The petitioners herein are owners of condominium units in a project undertaken by the respondent company ('the respondent'). The respondent had entered into a sale and purchase agreement with each of the petitioners, and by tenancy agreements the respondent in turn rented those units from the petitioners. The petitioners alleged that the respondent had failed to pay the amount of the rental due to the petitioners and that accordingly the respondent was indebted to the petitioners. The petitioners thus petitioned for the respondent company to be wound up. Prior to the filing of this winding up petition, the petitioners made statutory demands under s. 218(2)(a) of the Companies Act 1965 ('the notice') on the respondent for payment thereof.

Held (dismissing the petition):

[1] The heading of the notice of statutory demand submitted by the petitioners had made reference to non-existent subsections *ie, s. 218(e) and (i)* of the Companies Act 1965 and had failed to specifically state the correct subsections. Since this petition was founded on the statutory notice under s. 218, any defect in that notice was fatal. It was prejudicial to the

respondent as it was put in the disadvantage of having to fathom whether to limit its reply only in respect of the statutory demand under s. 218(1) which provides different circumstances in which a company may be wound up or to answer to the other matters under s. 218(2)(b) and (c). This notice of statutory demand was defective. Therefore, the statutory demand was infirmed and could not be used as a foundation to launch the petition. (pp 279 g & 280 a-b)

[2] The petitioners' statutory demand had been sent by AR registered mail and by courier service to the address stated. However, that was insufficient for the purpose of s. 218(2)(a) Companies Act 1965, which provides that the same has to be 'served on the company by leaving it at the registered office' (*Dayakuasa Holdings Sdn Bhd v. Kayael Holdings Sdn Bhd* [2003] 2 CLJ 391). The statutory notice of demand carries with it a very drastic consequence for a respondent company as failure to pay in accordance to that demand triggers off the deeming provision that the company is unable to pay its debts. The inability to pay debts is one of the grounds for which a company may be wound up under s. 218(1)(e) of the Companies Act 1965. In order for the petitioners herein to bring into effect that deeming provision, it was incumbent for the petitioners to comply strictly with the pre-requisites of that provision. If there was any doubt arising as to whether the requisite and proper demand had been given to the respondent company, then the petitioners had failed to bring into effect those deeming provisions. This was so especially in view of the very dire and drastic consequences of the default of compliance of such a demand. (pp 280 f-g & 281 b-d)

[3] The issuance of the registrar's certificate under r. 32 of the Companies (Winding-up) Rules 1972 did not prevent this court from finding that there was no due compliance with the various requirements. The failure to comply with the basic requirements of the provisions necessary to bring the petition to be heard was fatal to the petitioners' case. Even if the statutory notice was not defective, it had not been properly served. (p 282 d)

[4] The court was not satisfied that the alleged debt or rental due was *bona fide* indisputable. The alleged debt arrived at by the petitioners was as a result of one sum set-off against another resulting from damages for late delivery and alleged rental against the balance of the purchase price. The parties ought to establish the debt by way of civil action rather than proceedings for winding up. The alleged debt has not in any case matured into a 'debt' within the meaning of s. 218(2)(a) of the Companies Act 1965. (pp 283 a & 284 d)

[Petitioners' petition dismissed with costs to the respondent.]

Case(s) referred to:

Dayakuasa Holdings Sdn Bhd v. Kayael Holdings Sdn Bhd [2003] 2 CLJ 391 HC ***(refd)***

Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 FC ***(refd)***

Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 FC ***(refd)***

Petro-Pipe Industries (M) Sdn Bhd v. Fieldwork Engineering Sdn Bhd [2003] 1 CLJ 777 HC ***(refd)***

Sungei Rinching Sdn Bhd v. Sri Keluarga Sdn Bhd [1996] 3 CLJ 44 CA ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218(1)(e), (2)(a), (b)

Companies (Winding-Up) Rules 1972, rr. 24, 32

For the petitioners - M Vijaya Kumar; M/s MV Kumar & Co

For the respondent - Kalyansundaran Rajagopal; M/s Kal & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Apandi Ali J:

Background

The respondent, Everworth Sdn. Bhd., was incorporated on 18 January 1989 under the Companies Act 1965 ('the Act'), with its registered office at Tenaga Koperat D/A Corporatehouse Ser, S/B Tingkat 4, Bangunan HSBC Bank (HBMB Building), No. 1 Jalan Mahkota, Kuantan, Pahang. The object of the respondent were, *inter alia*, to develop a recreation resort project known as Desa Riang (Sunny Beach Resort) ('the project'). The petitioners and the respondent has a long and protracted litigation history since 1999.

The petitioners and the parties in support of the petition are owners of the Condominium units in the said project undertaken by the respondent.

The petitioners petitioned for the winding-up of the company on the ground of the company's failure to pay its debt to them.

The company entered into a separate sale and purchase agreements with each of the petitioners for the respective unit apartments. By tenancy agreements with each of the petitioners the company in turn rented those units from the petitioners.

The petitioners took legal action *vide* Kuantan High Court Civil Suit No. 22-58-99 against the company, and in consequence of which, the petitioners obtained a Court Order on 10 August 1999, as exhibited in exh. "S3" in the petition; which reads as follows:

> ATAS PERMOHONAN Plaintif-Plaintif yang dinamakan di atas, DAN SETELAH MEMBACA Saman Dalam Kamar yang bertarikh 08hb Julai, 1999, Afidavit-Afidavit Pertama, Kedua dan Ketiga Ho Siew Choong yang diikrarkan pada haribulan 21hb Jun, 1999, 28hb Jun 1999, 5hb Julai 1999 masing-masing. Afidavit Menentusahkan Fakta-Fakta Yang Menyokong Perkara-Perkara Yang Dihadapkan Dalam Penyataan Untuk Mendapatkan Kebenaran Mahkamah Untuk Memohon Satu Perintah Bagi Komital yang diikrarkan oleh Lim Theam Chuan, Khor Sheue Wei, Ho Seiw Choong, Wong Yok Moi, Leng Kwan Fong dan Chong Wai Poh pada 2/08/99, Afidavit-Afidavit Keempat dan Kelima Ho Siew Choong yang diikrarkan pada 4/08/99 dan 5/08/99 masing-masing dan notis Niat untuk menggunakan kesemua Afidavit-Afidavit tersebut bertarikh 6/8/99 kesemuanya difailkan di sini DAN SETELAH MENDENGAR Encik M.V. Kumar Peguamcara bagi pihak Plaintif-Plaintif dan En. Krishman Ramiah Peguambela bagi pihak Defendan;
>
> ADALAH DIPERINTAHKAN BAHAWA Plaintif-Plaintif, selepas mendapatkan pemberian milikan kosong unit, samada pembelian tunai dan/atau menerusi pinjaman perumahan yang dikatakan sebelum ini, hanya perlu membuat bayaran terhadap Baki harga belian selepas ditolak darinya Gantirugi untuk pemberian milikan lewat menurut fasal 22 dan 24 Perjanjian jual-beli tersebut sebagaimana dalam skedule yang dilampirkan sebagai eksibit "HSC 19" dan disini, Dan sekiranya Gantirugi untuk pemberian lewat melebihi Baki harga belian, maka Defendanlah yang perlu membayar Plaintif jumlah yang lebih itu DAN bahawa kos bagi Permohonan ini dibayar oleh Defendan tersebut.
>
> Bertarikh 10hb Ogos 1999

The respondent filed on appeal against the said Court Order and the petitioners issued a statutory notice under s. 218 of the Companies Act 1965 to wind-up the respondent.

However, both parties negotiated and decided to settle their dispute and concluded with a document known as "A Deed of Settlement", executed on 16 October 2000. Under the settlement arrangement both parties, among others matters agreed as in cl. 10 of the Deed of Settlement, which reads as follows:

> The parties herein agree to withdraw the Appeal, the S218 Notice, all civil suits, proceedings, appeals and any legal action whatsoever with no order as to cost save and except herein provided and neither party shall have any claims against each others.

However, despite the Deed of Settlement, the petitioners alleged that, the respondent reneged on the settlement and failed to pay any amount of the 'debt' or rental due to the petitioners, and that accordingly the company was indebted to the petitioners for the 'debt' and the rental accrued. The petitioners then, for the second time, petitioned for winding-up of the company, which is the winding-up petition in this case.

The petitioners, prior to the filing of the petition, purportedly made statutory demand under s. 218(2)(a) of the Companies Act 1965 ('the Notice') on the respondent for payment thereof.

The Notice Of Statutory Demand

This is the statutory demand pursuant to s. 218(2)(a) Companies Act 1965. The purported demand dated 19 July 2002, which, for purpose of ease of reference is quoted in full and reads as follows:

M.V. KUMAR
Advocates & Solicitors

No. 50-2 Jalan Telawi
3-2, Jalan Telawi 2, Bangsar Baru
59100 Kuala Lumpur, Malaysia

Telephone 03 2284 2848
Facsimile/Voice Mail 03 2284 5895

M.Vijaya Kumar
B.A. (Law & Pol.) (Hons.)Keele.C.L.P.

Our ref: sunny/1007/A4/98L

AR Registered/Courier

Everworth Sdn. Bhd.
B-330, 1st Floor, Jalan Beserah
25300 Kuantan
Pahang

AR Registered/Courier

Lot 342, Mukim Sungai Karang
26080 Kuantan
Pahang

AR Registered/Courier

D/A Corporation Ser, S/B
Tkt. 4, Bangunan HSBC Bank
No. 1, Jalan Mahkota
25000 Kuantan

Pahang

Attn: Mr. E. Elkhishin

Dear Sirs,

Re: DESA RIANG SUNNY BEACH RESORT, SUNGAI ULAR, KUANTAN (THE "PROJECT")
DEVELOPER: EVERWORTH SDN. BHD. (505810-96/896) ("EVERWORTH")
LAND: HS (M) 4608 NO. PT 4853 MUKIM SUNGAI KARANG, TEMPAT SUNGAI KARANG, NEGERI PAHANG DARUL MAKMUR DEED OF SETTLEMENY DATED 16/10/2000 (THE SAID "DEED OF SETTLEMENT") NOTICE PURSUANT TO SECTION 218(E) AND (1) OF THE COMPANIES ACT 1965

1. We refer to the above, a copy letter dated 21/01/2002 and the Deed of Settlement dated 16/10/2000 a copy of all is annexed hereto setting out full particulars in respect of all matters.

2. We act for the persons set out in column 1 of schedule ("the Said Schedule") annexed hereto which shall from an integral part of this notice. Further to our letter dated 21/01/2002 you have failed to make payment of the instalment at column 3 of the Said Schedule and hence the entire Outstanding Debt pursuant to and as defined in Clause 9 of the Deed of Settlement as set out in the second column of the Said Schedule hereto has been become due and payable forthwith.

3. Also further to our letter dated 21/01/2002, you have failed to make payment of rental to our client in the amount as set out against their respective names in the 4th columns of the Said Schedule pursuant to the Tenancy Agreement entered into between yourself and our clients respectively forming an integral part of the Deed of Settlement. Please Take Notice that as to date that the 2nd quarterly rental is due and owing and rental hereafter shall continue from the date of this Notice to the date of full payment or realisation.

4. TAKE NOTICE that we have our instructions from our clients to demand that you pay, secure or compound to our clients the respective sums as set out in column 5 of the Said Schedule against their respective names.

5. TAKE FURTHER NOTICE that if you fail to settle the respective amounts as set out in column 5 of the Said Schedule within twenty one (21) days from the date of service of this notice on you, then you, Everworth Sdn. Bhd. shall be deemed to be unable to pay its debts within the meaning of s. 218 of the Companies Acts, 1965 and we have our clients' strict instructions to present a winding-up Petition against you.

Dated the 19 July 2002
t.t.
Solicitor for the Petitioner

c.c.
clients

It is noted that there is no prescribed form for which the notice is to be given. The function of the notice is to warn the respondent company of a winding-up petition. It must relate to a quantifiable debt due at the time of the notice.

In the Court of Appeal decision in *Sungei Rinching Sdn. Bhd. v. Sri Keluarga Sdn. Bhd.* [1996] 3 CLJ 44, the notice demanded the judgment sum due under the judgment together with interest and costs. The demand however did not specify the amount of costs payable by the company, and it was contended that the notice under s. 218(2)(a) was bad for that reason. The Court of Appeal held that there was no dispute as to the sum owed and the company was clearly not in any way misled in that respect. In the circumstances the Court of Appeal upheld the petitioner's contention that the demand was valid since the sum and interest could easily be ascertained.

In a subsequent Federal Court decision in *Malaysia Air Charter Company Sdn. Bhd. v. Petronas Dagangan Sdn. Bhd*. [2000] 4 CLJ 437, it was held that the purpose of the statutory demand was to demand the judgment sum inclusive of the interest, quantified or otherwise, and to warn the company that if the sum was not paid within the stipulated period, there would be an impending winding-up proceedings and that even adopting a strict interpretation, the failure to quantify the interest did not render the notice invalid.

In the instant case, the notice of demand was headed *inter alia* 'Notice Pursuant To s. 218(e) and (i) of the Companies Act 1965' – refer to s. 5 KM 2. There is no s. 218(e) or s. 218(i) of the Companies Act 1965.

The petition suffers from 2 infirmities;

a) That the heading of the statutory demand makes reference to a non existent sub-section ie, s. 218(e) and (i) of the Companies Act 1965; and

b) That the statutory demand had failed to specifically state the correct sub-sections. The sub-sections cited are foreign to the substantive law.

Since this petition is founded on the statutory notice under s. 218, any defect in that notice is fatal. It is prejudicial to the respondent as they are put to a disadvantage having to fathom whether to limit its reply only in respect of the statutory demand under s. 218(1) which provide different circumstances in which the company may be wound-up or that the respondent has also to answer to the other matters under s. 218(2)(b) and (c).

This notice of statutory demand is defective. Therefore, the statutory demand is infirmed and cannot be used as a foundation to launch the petition.

Service Of The Statutory Demand

The relevant provision is s. 218(2)(a) Companies Act 1965 provides that:

> **Section 218. Circumstances in which company may be wound up by Court ...**
>
> **Definition of inability to pay debts.**
>
> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to a pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

The petitioners' case is that the demand had been sent by AR registered mail and by courier service to the address therein stated. Is that sufficient for the purpose of s. 218(2)(a) Companies Act 1965, which provides that the same is to be "served on the company by leaving at the registered office".

I do conclude that the demand has not been 'served on the company by leaving at the registered office'. In so holding, I follow the decision in *Dayakuasa Holdings Sdn Bhd v. Kayael Holdings Sdn Bhd* [2003] 2 CLJ 391 where his Lordship Low Hop Bing J stated:

> Since the statutory demand was merely sent by registered post to the respondent's registered office, but was not served on the respondent by leaving it at the registered office, it seems clear to me that the strict requirement of Section 218(2)(a) has not been complied with by the petitioner.

I refer to a Federal Court case of *Muniandy a/l Thamba Kaundan & Anor v. D&C Bank Bhd. & Anor* [1996] 2 CLJ 586 it was held:

> Sending a notice is a far cry from serving one. Even if there was proof of posting of the notice, this accompanied by the fact that it was not returned would not have sufficed as proof of service in the absence of a deeming clause in the contract of loan or annexure to the charge.

I now pause to note the importance of the statutory notice of demand. That demand carries with it a very drastic consequence for a respondent company. Failure to pay in accordance to that demand triggers off the deeming provision that the company is unable to pay its debts. The inability to pay its debt is one of the grounds for which a company may be wound up – as provided for under s. 218(1)(e) of the Companies Act 1965.

Now, in order for the petitioners to bring into effect that deeming provision, it is incumbent for the petitioners to comply strictly with the pre-requisite of that provision. If there is any doubt whether the requisite and proper demand had been given to that company, then I am inclined to think that I ought to hold that the petitioners have failed to bring into effect those deeming provisions. This is so especially in view of the very dire and drastic consequences of the default of compliance of such a demand.

Advertisement Of The Petiton

The respondent also raised the issue of non-compliance with r. 24 of the Companies (Winding-up) Rules 1972. Rule 24 of the Companies (Winding-up) Rules 1972 provides:

> **24. Advertisement of petition. Form 4.**
>
> Every petition shall be advertised in Form 4 seven clear days or such longer time as the Court may direct before the hearing, as follows:
>
> (a) once in the Gazette and twice at least in two local newspapers circulating in Malaysia or in such other newspapers as the Court may direct;
>
> (b) the advertisement shall state the day on which the petition was presented and the name and address of the petitioner and of his solicitor and local agent (if any) and contain a note at the foot thereof, stating that any person who intends to appear on the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner or to his solicitor or local agent, within the time and in the manner prescribed by Rule 28, and an advertisement of a petition for the winding-up of a company by the Court which does not contain the note shall be deemed irregular;

and if the petitioner or his solicitor does not within the time hereby prescribed or within such extended time as the Registrar may allow duly advertise the petition in the manner prescribed by this rule the appointment of the time and place at which the petition is to be heard, shall be cancelled by the Registrar and the petition shall be removed from the file unless the Judge or the Registrar shall otherwise direct.

What does 'twice at least in two local newspapers' means under r. 24? This point has been decided in *Petro-Pipe Industries (M) Sdn Bhd v. Fieldwork Engineering Sdn Bhd* [2003] 1 CLJ 777. I respectfully adopt the erudite reasoning of his Lordship Hishamudin Yunus J in holding that r. 24 of the Companies (Winding-up) Rules requires the petition must be advertised two times, on two different dates, in each of the two newspapers, that is to say, four advertisements altogether, in preference to the interpretation for only two advertisements.

In the instant case, there have been a total of 4 advertisements of the petition, however, only 2 in the same newspaper of different dates (The New Straits Time dated 23 April 2003 and 7 July 2003) and the other 2 are in 2 different newspapers of different dates (The STAR dated 17 July 2003 and Berita Harian dated 25 April 2003). I conclude that there has been due compliance with r. 24 of the Companies (Winding-up) Rules 1972.

The Certificate Under r. 32

Rule 32 of the Companies (Winding-up) Rules 1972 provides that:

Rule 32. Attendance on the Registrar.

(1) After a petition has been presented, the petitioner or his solicitor shall on a day to be appointed by the Registrar attend before the Registrar and satisfy him that:

(a) the petition has been duly gazetted and advertised;

(b) the prescribed affidavit verifying the statements therein and the affidavit or service, if any, have been duly filed;

(c) the consent in writing of the approved liquidator nominated by the petitioner has been obtained and filed;

(d) the provisions of these Rules as to petitions have been duly complied with; and

(e) a sum of three hundred dollars has been deposited to cover the fees and expenses to be incurred by the approved liquidator or the Official Receiver as the case may be. This deposit shall be refunded to the petitioner by the liquidator before taking any action under section 292.

I am quite satisfied that the issuance of the Registrar's Certificate under r. 32 does not prevent this court from finding that there has not been due compliance with the various requirements. I can do no better than to repeat what his Lordship Hishamudin Yunus J stated in *Petro-Pipe Industries (M) Sdn Bhd v. Fieldwork Engineering Sdn Bhd* [2003] 1 CLJ 777.

> In the present case, the learned registrar, with respect, has mistakenly issued a certificate pursuant to Rule 32 notwithstanding the fact that there has been a serious non-compliance with Rule 24. Looking at the matter objectively, the petitioner has failed to satisfy the registrar that there has been due compliance with regard to advertisements as required by Rule 32(1)(a) of the Winding-up Rules 1972. In my opinion, it is within the powers of this court to set aside the certificate if the registrar has erroneously issued it; and I do intend to set it aside. The question of estoppel does not arise at all here. I must add that regardless of the fact that a certificate has been issued by the registrar, I am of the opinion that where the petitioner has failed to satisfy the registrar that there has been due compliance with Rule 24 (and with the other requirements as prescribed by the Winding-up Rules), I have no power to proceed with the petition. Under the law, the court, under the circumstances, has only two options: either to dismiss the petition or to adjourn the hearing of the petition. This is clearly provided by Rule 32(2) which reads as follows:
>
> (2) No order save an order for the dismissal or adjournment of the petition shall be made on the petition of any petitioner who has not, prior to the hearing of the petition, attended before the Registrar at the time appointed and satisfied him in the manner required by this rule.
>
> In my judgment, while it is not disputed that the petitioner in the present case had "attended before the registrar", and a certificate of due compliance has been issued by the registrar, yet, clearly, the petitioner cannot be said to have "satisfied him in the manner required by this rule." In my view, whether or not the petitioner has so satisfied the registrar, such an issue must be looked at objectively and not subjectively.

Failure by the petitioners to state the correct provision of the Companies Act 1965 coupled with statement of non-existent provisions is fatal. Therefore, the statutory demand is infirmed and cannot be used as a foundation to launch the petition.

The parties have cited various cases, but none of them touches on the issue of the wrong citation of the particular sub-section of s. 218 of the Companies Act 1965 under which the demand is grounded. I have noted the decisions in *Sungei Rinching Sdn Bhd v. Sri Keluarga Sdn Bhd* [1996] 3 CLJ 44, and *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 2 CLJ 160 referred earlier above.

I do find that the statutory demand has not been duly served in accordance with the provisions of s. 218(2)(1) of the Companies Act 1965, in that it was not 'served on the company by leaving at the registered office'. I agree with the decisions in *Dayakuasa Holdings Sdn. Bhd. v. Kayael Holdings Sdn. Bhd.* [2003] 2 CLJ 391 and *Muniady a/l Thamba Kaundan & Anor v. D&C Bank Bhd. & Anor* [1996] 2 CLJ 586.

I do find that there has been due compliance with the requisite advertisements of the petition 'twice at least in two local newspapers pursuant to r. 24 of the Companies (Winding-up) Rules 1972.

The failure to comply with the basic requirements of the provisions necessary to bring the petition to be heard is fatal to the petitioners' case. Even if the statutory notice is not defective, it has not been properly served.

I further noted that from the nature of the "debt" in this case. I am far from satisfied that the alleged debt is *bona fide* indisputable. The alleged debt arrived at by the petitioners are as a result of one sum set-off against another resulting from damages for late delivery and alleged rental against the balance of the purchase price. The parties ought to establish that debt by way of civil action rather than proceedings for winding up. The alleged debt has not in any case matured into a 'debt' within the meaning of s. 218(2)(a) of the Companies Act 1965.

I therefore dismiss the petitioners' petition with costs to the respondent.

By way of obiter, I would add that parties who filed their notices of intention to support this petition can take other legal recourse for their claims.